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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

v.

J. MILLARD TAWES, GOVERNOR, ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the ground that this appeal does not present the question sought to be reviewed or a substantial Federal question.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland affirming a decree of the Circuit Court for Anne Arundel County, which found Section 2 of Article III of the Maryland Constitution, dealing with membership in the Maryland Senate, to be constitutional and not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

On April 25, 1962, the Court of Appeals of Maryland, following the decision in *Baker v. Carr*, 369 U.S. 186, held that a justiciable question was presented by the Appellants' Bill of Complaint, and remanded the cause with instructions for further consideration by the Circuit Court for Anne Arundel County. On May 24, 1962, the Circuit Court for Anne Arundel County, pursuant to the instructions contained in the order of the Court of Appeals of Maryland, filed an opinion in which it was held that Section 5 of Article III of the Maryland Constitution, relating to representation of the Maryland House of Delegates, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States insofar as it applied to the election of November, 1962. The court reserved the question as to whether Section 2 of Article III, relating to membership in the Maryland Senate, was unconstitutional.

The General Assembly of Maryland was convened in extraordinary session on May 25, 1962 by virtue of a proclamation of the Governor, and on May 31, 1962, the General Assembly passed, and the Governor approved, Chapter 1 of the Special Session of 1962, which legislation added nineteen seats to the House of Delegates, to be elected at the November 6, 1962, General Election, which seats were distributed among the more populous counties and Baltimore City.

An appeal was entered to the Court of Appeals of Maryland from the order of the Circuit Court for Anne Arundel County complaining of the failure of the Circuit Court to make an express finding on the composition of the Maryland Senate. The Court of Appeals of Maryland, by its order of June 8, 1962, remanded the case to the Circuit Court for Anne Arundel County with instructions to determine this issue.

On June 28, 1962, the Circuit Court for Anne Arundel County issued a decree and filed an opinion holding that the present composition of the Maryland Senate was valid and constitutional. From this decree, an appeal was taken to the Court of Appeals of Maryland and the case was heard in a special session of the Court on July 23, 1962. Following argument, the Court of Appeals affirmed by a *per curiam* order the decree of the Circuit Court for Anne Arundel County. On September 25, 1962, the Court of Appeals filed its opinion with three dissents incorporated into two dissenting opinions.

The gravamen of Appellants' claim is set forth in Paragraph 22 of the Bill of Complaint, which states as follows:

> "Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince Georges and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 senators.)"

In the trial court, the Appellants conceded that after the reapportionment of the House of Delegates as a result of the action of the Special Session of the General Assembly, the House was legally reapportioned as to population (See Judge Duckett's Supplemental Opinion, page 16 of Jurisdictional Statement). The only issue presented therefore was whether the Senate of Maryland must, in order to comply with the Fourteenth Amendment, be based also on population.[1]

[1] In Appellants' Supplemental Memorandum filed in the Circuit Court for Anne Arundel County Appellants said: "The issue as to the alleged unconstitutionality of former Section 5 of Article III of

QUESTION PRESENTED

Does the Fourteenth Amendment and Constitution of the United States REQUIRE that the membership of both houses in a bicameral legislature, such as the General Assembly of Maryland, be "based on, or reasonably related to, the present population" of the various political subdivisions of the State?

STATEMENT OF HISTORICAL FACTS

The General Assembly of Maryland, from its inception, has been composed of two houses, each of which was designed to represent different segments or ideologies present in the State. Article III, Section 1 of the Maryland Constitution embodies this principle and states:

> "The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland".

By the Constitution of 1776, the House of Delegates was comprised of four Delegates from each county, plus two from Annapolis and Baltimore Town (then a part of Baltimore County). By contrast, the Senate of Maryland was composed of fifteen Senators, six from the Eastern Shore and nine from the Western Shore, chosen by an electoral college consisting of forty members. Each county supplied two electors, and Annapolis and Baltimore Town were allotted one each.

Subsequently, by Chapter 197 of the Acts of 1836, ratified by the electorate in 1837, the Senate was reconstituted to consist of one Senator from each county and one from

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the Maryland Constitution (relating to the composition of the House of Delegates) therefore now seems moot, at least until 1966" (Parentheses supplied).

Baltimore Town. The method of indirect election by the electoral college was then abandoned.

The Constitution of 1851, and each succeeding Constitution, provided for members in the House of Delegates to be based generally on a population ratio. It provided that each county should be allotted representation based on the census of 1860 and each succeeding Federal census, subject, however, to the provision that no county should have less than two Delegates. Similarly, the Constitution of 1864 apportioned the House of Delegates on the basis of population with one Delegate for the first 5,000 persons, and thereafter each Delegate to represent a graduated scale of population.

The Constitution of 1867 allotted seats in the House of Delegates based upon a graduated scale of population, permitting, however, the guaranteed minimum of two Delegates to each county or legislative district of Baltimore City, regardless of population.

In 1949 the General Assembly "froze" membership in the House of Delegates based upon the 1940 census in order to halt a growing inequity in the House because of the fact that the larger counties had reached their maximum representation under the graduated scale as set forth in the Constitution of 1867, while the smaller counties were still gaining seats.

By contrast, the Senate of Maryland, in the Constitution of 1851 and as continued by the Constitutions of 1864 and 1867, each county was granted one seat. However, Baltimore City, which in 1851 had achieved the status of a political subdivision independent of Baltimore County, was thereafter by the Constitution of 1864 allotted three Senators, one from each legislative district, which provision continued in the Constitution of 1867. In 1900,

Baltimore City received an additional legislative district and Senator, and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County, pursuant to the provisions of Chapter 82 of the Acts of 1918.

ARGUMENT

The Appellants by their Bill of Complaint, their brief in the Court of Appeals of Maryland and in their Jurisdictional Statement filed in this Court based the thrust of their argument upon the proposition that the Fourteenth Amendment *requires* that the composition of both houses of the Maryland Legislature be based upon or reasonably related to the present population of the various political subdivisions of this State. It is respectfully submitted that this argument is doctrinaire and that the Fourteenth Amendment does not require any state to adopt any system of membership in its legislative body, provided there is no denial of equal protection of the laws.

This Court, in 1948, in *MacDougall v. Green*, 335 U.S. 281, clearly stated the law as follows:

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution — a practical instrument of government — makes no such demands on the State. * * *".

Mr. Justice Douglas, concurring in *Baker v. Carr*, 369 U.S. 186, stated at Pages 244-245:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' See *Skinner v. Oklahoma*, 316 U.S. 535, 541. Universal equality is not the test; there is room for weighting. As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' "

And Mr. Justice Stewart, in his concurring opinion in *Baker v. Carr, supra*, Pages 265-266, stated:

> "The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary — without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother HARLAN, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter.' *Post*, p. . The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' *Post*, p. . And contrary to the suggestion of my Brother DOUGLAS, the Court most assuredly does not decide the question, 'may a State weight the vote of one county or one district more heavily than it weights the vote in another?' *Ante*, p.
>
> "In *MacDougall v. Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities

> for exerting their political weight at the polls not available to the former.' 335 U.S., at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term — that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan v. Maryland*, 366 U.S. 420, 425. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584."

It is clear that this Court has consistently ruled that political power is not a function exclusively of numbers, since this disregards practicalities of government. The States have exercised wide latitude as to the composition of their legislatures. Historically, the claim of political subdivisions to representation regardless of size has been an important reason for departing from the rule of apportionment according to population. From our earliest history, the town or county was often the dominant unit of government, and colonial assemblies and their successors, the State legislatures, were composed of representatives of these entities. Since it was the town or county that was being represented in a very real sense, it has been natural to guarantee each unit at least one representative in one and many times in both, of the branches of the legislature. Such provisions prevail in the constitutions of approximately twenty-seven states. In fact, in only fourteen states do the constitutions provide for periodic legislative reapportionment of *both* houses by a substantially unqualified application of the population standard.[2]

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[2] Colorado, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska (unicameral legislature), North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, Washington and Wisconsin.

The Federal Constitution itself contains a similar compromise between the claims of the States and direct representation of the people. Many factors have been considered. For example, in New Hampshire, seats in the Senate are apportioned according to a ratio of direct taxes paid. In Connecticut representation in one house is based upon representation of towns and not in any way based upon population.

The reason for such constitutional State-craft involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality of voting rights is achieved only if the entire state legislature were elected at large, but with such a plan there is great danger that the remote and less populated sections would be neglected, and in the event of a conflict between various parts of the state, the more populous region could elect the entire legislature and the minority would never be heard in its councils.

The Appellants at several places in their Jurisdictional Statement stress the fact that 15% of the population of Maryland elected a majority of the Maryland Senate. From this, they assume that the Senate is controlled, in fact, by the action of a minority of the people, which has and continues to thwart legislation introduced in the General Assembly for the welfare of the majority. Appellants lose sight of the practicalities of government when they make such an allegation. There is no proof or showing that the so-called "rural representatives" vote as a unit or block, disregarding party affiliation, their views whether liberal or conservative, or the will of their constituents. Appellants further lose sight of the fact that according to the 1960 census the twenty-six least populated states have a population of approximately 31,000,000, which represents 17%

of the population of the United States, and yet these states have 52% of the representation in the United States Senate. It has never been urged that the least populated states vote as a block and disregard party, economic, philosophic and other considerations in passing upon legislative proposals. Actions in the Maryland Senate, just as in the United States Senate, are not motivated by rural versus urban arguments, but are motivated by other factors, including party, economic, social and political philosophy of the members of those legislative bodies. In the General Assembly of Maryland, as in the Congress of the United States, the delegations from many counties are divided by party and there is no unanimity among those delegations. Thus, in Maryland, the legislative delegations from several of the counties, both rural and urban, are divided between the Republicans and Democrats so that there is no uniform action for the counties insofar as party is concerned. The arguments made by the Appellants of control by a minority are neither supported by the record nor are they supported in fact or theory. To require that each house of the General Assembly of Maryland be elected by a system of population proportions, as now urged, would substantially defeat the reasons for a bicameral legislature, particularly where the terms and qualifications of the members of both houses are virtually the same.

The Maryland system of representation, like that of the Congress of the United States, is a hybrid, a system recognizing representation of lesser governmental units in one house and representation based on population in the other. (See James Madison in the Federalist, No. 62.)

Can it be said that the Fourteenth Amendment to the Constitution extracts from the States a higher or different standard regarding representation in the state legislatures

than it does upon the Federal Government? The Appellants' attempt to distinguish the Maryland legislative structure from that of the United States upon the ground that the Federal unit joins sovereign states, while Maryland is a unitary State. It is respectfully stated that this argument is merely an exercise in semantics.

As previously pointed out, in our colonies local subdivisions, such as towns or counties, rather than approximately equal population units, were the dominant units of government. The colonial assembly was composed of representatives from these units without regard to the population of the town or county. Notwithstanding the foregoing, at least since the adoption of the Constitution of the United States in 1789, the States have relinquished their "sovereignty" in the traditional sense of the word. In fact, some thirty-seven of the states have been admitted to the Union since the Constitution was originally adopted, and with the possible exception of Texas, none of these states ever enjoyed true or external sovereignty.[3]

It is an interesting historical fact that the mode of selecting the members of the United States Senate was modeled to a considerable extent upon the Maryland Senate, as created by the Constitution of 1776. In commenting upon the composition, election and tenure of the Maryland Senate, James Madison in the Federalist, No. 63, stated:

> "* * * and the Maryland Constitution is daily deriving from the salutary operations of this part of it (functions of the Maryland Senate), a reputation in which it will probably not be rivalled by that of any state in the union." (Parentheses supplied.)

[3] The two most recent additions — Alaska and Hawaii — have constitutions containing provisions for senatorial districts of marked inequality in population.

POST — BAKER V. CARR

Mr. Justice Harlan, in his dissenting opinion in *Baker v. Carr, supra,* pointed out that the Court was permitting "an adventure in judicial experimentation", and it appears that the various cases decided subsequent to that landmark decision justified his conclusion.

On April 14, 1962, the United States District Court for the Middle District of Alabama (Northern Division), in *Sims v. Frink*, 205 F. Supp. 245, considered the failure of the Alabama legislature to reapportion both of its houses in accordance with the Alabama constitutional mandate that there should be a reapportionment after each decennial census and that the legislature shall be apportioned according to population, provided that each county shall have at least one representative in the house. In regard to the senate, a fixed number of senators is designated and the state is to be divided into senatorial districts which are to be based upon population. The court ordered the Alabama legislature to comply with its own constitutional mandate and deferred further action. Subsequently, on the 21st day of July, 1962 (208 F. Supp. 431), the court considered the reapportionment legislation passed by the special session and found that the new statutes did not fully remedy the existing evil. The court thus carefully stated:

> "* * * Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the '67-Senator Amendment.' The pro-

> vision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. * * *".

Two cases were decided by the United States District Court for Georgia which attempted to establish standards and guideposts for determining "invidious discrimination" in apportionment. In the first, decided on April 28, 1962, was *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga.), the court invalidated the long-established county unit voting system in that State's primaries. The court, however, applied several tests and, following the rationale of *MacDougall v. Green*, *supra*, said:

> "We make the test on a consideration of all relevant factors, and these include rationality of state policy. See the concurring opinion of Mr. Justice Clark in *Baker v. Carr* where the dismissal of the appeal in *South v. Peters*, supra, was said to reflect the viewpoint of the Supreme Court 'to refrain from intervening where there is some rational policy behind the State's system.'
>
> "Another test is whether or not the system is arbitrary. The right of plaintiff in this connection depends upon the treatment accorded his unit. His unit, Fulton County, must be related to the state as a whole in measuring his right, and his right is the same as that of all other Democrats in his unit. The fact that Echols or some other small county receives more than its share is of no concern to Fulton County so long as it is accorded proper treatment. And the consideration of this factor includes the applicability of the diffusion principle — the right of a state to properly diffuse political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities

for asserting their political weight at the polls not available to the former. The Constitution — a practical instrument of government — makes no such demand on the states.' *MacDougall v. Green*, supra, at page 284. We have considered too the genesis of the System, whether or not it was for a fair purpose in the beginning — that it was is self-evident from the history heretofore set out.

"Another important factor to be considered in making the test is whether or not the unit system has a historical basis in our political institutions, both federal and state. * * *".

In *Toombs v. Fortson*, 205 F. Supp. 248, the United States District Court for the Northern District of Georgia found that the apportionment of the Georgia legislature presented an invidious discrimination and, therefore, was unconstitutional. The court clearly stated, however, at page 257:

"* * * we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population."

Subsequently, the court considered a proposed constitutional amendment under which the Georgia senate would be apportioned according to population, while the composition of the house of representatives would allow one member from each of the state counties. The majority of the United States District Court found this arrangement to be constitutional, since it followed the basic structure of the United States Congress, and ruled that there was no invidious discrimination. See *Toombs v. Fortson*, . F. Supp. . Northern District of Georgia, September 5, 1962.

Also enlightening is *Caesar v. Williams*, 371 P. 2d 241 (Idaho), decided on April 3, 1962. As in the case at bar,

the Appellants contended that since the apportionment statutes did not provide for substantially equal representation in the two houses for residents of the more populous counties, the statutes violated both the State and Federal Constitutions. The court concluded that the Idaho constitutional provision, which permitted representation to be based on other than a numerical basis, was not unconstitutional or in violation of the Fourteenth Amendment.

This Court, in *W.M.C.A., Inc. v. Simon*, 370 U.S. 190, remanded to the United States District Court for the Southern District of New York proceedings to determine the question on the merits without the question of justiciability hanging over the decision. Thereafter, the District Court (208 F. Supp. 368) dismissed the complaint and found that the New York provisions governing the apportionment of the senate and assembly districts were not unconstitutional, and also that the system providing senatorial districts was neither irrational nor arbitrary. The court, after reviewing the historical basis, stated as follows at page 379:

> "As already indicated geography, accessibility, a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses, have not been cast out as proper factors in apportionment methods."

Also of interest is *Sobel v. Adams*, 208 F. Supp. 316, which considered the new apportionment action of the Florida state legislature. In Florida, even under the new apportionment, a disparity exists between the more populous and the less populous areas. It is important to note that in Florida, as in Maryland (with the exception of the Maryland counties of Montgomery and Baltimore), the legislature is the local law-making body for the counties. The enactment of local acts is procured by the legislative

delegations from the areas affected, and are not of general consequence to the state as a whole. The court there found that this phase of the exercise of state sovereignty could not be adequately carried out if a substantial number of the less populous counties of the state were deprived of representation in the legislature. It was also found that notwithstanding some inequities, the forming of the senatorial districts was proper even though population was not the dominant factor in determining the arrangement of senatorial districts.

Also of importance is the case of *Scholle v. Hare*, 369 U.S. 420, which was remanded to the Supreme Court of Michigan for a determination on the merits of the question there presented. The majority of the Michigan court (116 N.W. 2d 350) found that there was no formula to explain the division or grouping of counties and parts of counties into senatorial districts, and for that reason there was no rational basis for the classification involved and, therefore, it was irrational and arbitrary. We respectfully submit that the Michigan case is substantially distinguishable from the case at bar since in that case there was no attempt to grant representation to lesser governmental units, such as counties or towns, but merely an arbitrary and irrational division of the state without regard to any standard. Significantly, Mr. Justice Stewart has stayed the effect of the Michigan court's order pending further review by this Court.

Following the decision of this Court in *Baker v. Carr*, *supra*, the District Court for the Middle District of Tennessee, on June 22, 1962, reviewed and considered reapportionment legislation passed at a special session of the Tennessee legislature. In that case (206 F. Supp. 341), the court found that the reapportionment legislation only par-

tially eliminated the inequity in that the reapportioning of the senate of Tennessee was utterly arbitrary and lacking in rationality. The court, however, retained jurisdiction to allow the 1963 general assembly to cure this defect.

CONCLUSION

It is respectfully submitted to the Court that there was, as the Opinion of the Court of Appeals of Maryland indicates:

1. Rationality of State policy in the composition of the Maryland Senate, and there has been no showing that the system is arbitrary.

2. That there is, and has been, a historical basis for the system of allowing representation of lesser political subdivisions of the State and, in fact, the Maryland system substantially resembles the system adopted by the Founding Fathers in the establishment of the Congress of the United States.

3. That geography is an important element in determining a proper composition of political initiative between the State's thinly populated counties and those having concentrated masses.

In addition, we believe that this Court should not under any circumstances overcome the presumption of constitutionality of a state's constitutional provisions unless the alleged violation of constitutional rights is clear. It is respectfully submitted that there has been no clear showing of a violation of constitutional rights, and that it is within the province of the General Assembly of Maryland and the people of Maryland to determine the wisdom or

practicality of the system adopted by the people, and not a matter for the courts to decide.

Respectfully submitted,

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